

**Sheet Metal Workers International Association,
Local 28, AFL-CIO and Borella Brothers, In-
corporated. Case 29-CC-1175**

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

On July 9, 1996, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

As in *Sheet Metal Workers Local 28 (Astoria Mechanical)*, 323 NLRB 204, also issued today, we agree with the judge's recommendation that a broad remedial order against the Respondent is warranted in this case because the Respondent has been shown to have a proclivity to violate Section 8(b)(4) of the Act.³ This proceeding represents the third instance during the period between April 1994 and February 1996 in which the Respondent engaged in threats or picketing in violation of Section 8(b)(4)(ii)(B) of the Act.⁴ In finding a broad order appropriate, however, we do not rely on the Re-

spondent's prior conduct covered by judgments of the U.S. Court of Appeals for the Second Circuit dated March 8, 1984, and October 23, 1986, which enforced Board Orders against the Respondent which were issued pursuant to the execution of Formal Settlement Stipulations. Because both of these settlement stipulations contained nonadmissions clauses, they have no probative value in establishing that the Respondent violated the Act in the cases at issue.⁵

Further, we also do not rely on an informal settlement agreement to which the Respondent was a party in Case 2-CC-2195, approved by the Acting Regional Director on February 3, 1994. As we stated in *Astoria Mechanical*, supra, informal settlement stipulations have no probative value in establishing violations of the Act, and therefore such stipulations cannot be considered in determining whether a respondent has shown a proclivity to violate the Act.

In the circumstances presented here, however, we find that a broad remedial order is appropriate, even without regard to the conduct covered by the aforementioned formal and informal settlement stipulations.

ORDER

The Respondent, Sheet Metal Workers International Association, Local 28, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from in any manner threatening, coercing, or restraining Herman/Stewart Construction, Best Restaurant Equipment & Design Co., Houston's Restaurants, Inc., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Herman/Stewart Construction, Best Restaurant Equipment & Design Co., Houston's Restaurants, Inc., or any other person to cease doing business with each other, with Borella Brothers, Incorporated, or with any other person.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its New York, New York business offices and all meeting halls located within the State of New York copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notice to members are customarily posted. Reasonable steps shall be taken by the Respondent

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The General Counsel has excepted to the judge's failure to include Houston's Restaurants, Inc. in the cease-and-desist portion of his recommended Order as an entity to which the Respondent's unlawful conduct was directed. We find merit in the General Counsel's exception, and shall modify the recommended Order accordingly. In addition, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³ *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715 (1993); *Iron Workers Local 378 (N.E. Carlson Construction)*, 302 NLRB 200 (1991); *Iron Workers Local 433 (United Steel)*, 293 NLRB 621 (1989); and *Operating Engineers Local 12 (Associated Engineers)*, 270 NLRB 1172 (1984).

⁴ In addition to the Respondent's unfair labor practice occurring in November 1995 found in *Astoria Mechanical*, supra, the Respondent was found to have violated Sec. 8(b)(4)(ii)(B) in April 1994 in *Sheet Metal Workers Local 28 (Turner Construction Co.)*, JD-NY-17-95 (Mar. 29, 1995), which the Board adopted on May 17, 1995, in the absence of exceptions. The violation in the present case occurred in February 1996.

⁵ See *Astoria Mechanical*, supra.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ed. Reasonable steps shall be taken by the Respondent to ensure that the notice are not altered, defaced, or covered by any other material.

(b) Furnish the Regional Director with a sufficient number of signed copies of the notice for posting by Borella Brothers, Incorporated, Herman/Stewart Construction, Best Equipment & Design Co., and Houston's Restaurants, Inc., provided those employers are willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any manner threaten, coerce, or restrain Herman/Stewart Construction, Best Restaurant Equipment & Design Co., Houston's Restaurants, Inc., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Herman/Stewart Construction, Best Restaurant Equipment & Design Co., Houston's Restaurants, Inc., or any other person to cease doing business with each other, with Borella Brothers, Incorporated, or with any other person.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28,
AFL-CIO

Elias Feuer, Esq., for the General Counsel.

Edmund P. Delia, Esq., of New York City, New York, for the Respondent.

David Prager, Esq. (Phillips, Nizer, Benjamin, Krim & Ballon, LLP), of New York City, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Sheet Metal Workers International Association, Local 28, AFL-CIO (the Respondent) has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act) by having threatened Herman/Stewart Construction (Herman) that there would be "trouble" and "lots of problems" at a construction site and that it would shut down the jobsite in

order to force Herman and Best Restaurant Equipment & Design Co. (Best) to cease doing business with Borella Brothers, Incorporated (Borella) and with each other.

I heard this case in Brooklyn, New York, on May 14, 1996. On the entire record,¹ including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel, Borella, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Borella is a corporation of the State of California and is located in Chatsworth, California. It is engaged in the business of installing equipment in restaurants. Annually, it derives in excess of \$50,000 from work done outside the State of California. I thus find that it meets the Board's nonretail standard for asserting jurisdiction.

II. LABOR ORGANIZATION STATUS

The pleadings establish that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

Herman, a general contractor in the building & construction business, subcontracted to Best the work of installing equipment and fixtures in a restaurant being built for Houston Restaurants, Inc. (Houston) in the Roosevelt Field Mall in Westbury, New York. Best contracted with Borella to install the equipment and fixtures there.

On February 10, 1996, Robert Borella and Robert McLaughlin, two employees of Borella, began work there. They are members of a teamsters local.

On February 15, 1996, Fred Amato, a business representative of the Respondent, approached them as they were installing sheet metal at the restaurant under construction. I credit the testimony of the two employees and not Amato's as his account, consisting in great part of negative responses to leading questions, was not plausible.

Amato introduced himself to the employees. When they told him what they were doing and that they were members of a teamsters local, he said that they were not supposed to be there, that this was "our work," an obvious reference to work he wanted done by members of the Respondent. Amato left. A short while later, Lee Alefantes, the job superintendent for Herman told the employees that "we have a problem" and asked them to come to a meeting in the Herman trailer. Amato was there when they arrived. Amato said that they did not belong there. Alefantes suggested that Borella hire some members of the Respondent to do some of the sheet metal work. Amato said that the Respondent would did all that work and that Borella could supervise but could not "pick up a tool." When the Borella employees said that they were going back to work and began to leave the trailer, Amato said that there were going to be some problems and that "we're going to shut this place down."

On the following day, Alefantes and Terry Varner, Herman's project coordinator, informed the Borella employees

¹ Certain errors in the transcript are noted and corrected.

that they could not permit them to work. They left and did not return until about February 24, 1996, a few days after the unfair labor charge in this case was filed. They were then able to complete their work.

The credited testimony² establishes that the Respondent, by its Business Representative Fred Amato and in furtherance of its demand that its members perform the sheet metal work at the Houston restaurant construction site, threatened to cause problems, and to shut down the work being done at that site with an object thereof being to force Herman to cease doing business with Best and Best, in turn, to cease

doing business with Borella. I thus find that its conduct constituted a secondary boycott. See *Iron Workers Local 433 (United Steel)*, 280 NLRB 1325, 1333 (1986).

CONCLUSION OF LAW

By its threats made with an object of forcing Herman and Best to cease doing business with Borella and with each other, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

For the reasons set out in a decision I issued today in another case involving the Respondent (JD-NY-39-95), a broad remedial order is warranted.

[Recommended Order omitted from publication.]

² Hearsay testimony, consisting of oral comments by Alefantes and of a letter signed by Varner tends to corroborate the testimony as to Amato's threat and is admissible, to be given weight as its inherent quality justifies. *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994). The Board does not require adherence to the requirement of Fed.R.Evid. 803, exception 24, that the proponent of a hearsay statement make known to the adverse party, with a fair opportunity to prepare to meet it, of the intention to offer the statement, and the particulars of it, including the name and address of the declarant.